85-1207

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING A CONSTRUCTION OF THE NATURAL GAS POLICY ACT OF 1978 THAT WILL ALLOW PRODUCERS TO RECEIVE VALUABLE NON-MONETARY CONSIDERATION IN ADDITION TO MONETARY CONSIDERATION EQUAL TO THE APPLICABLE MAXIMUM LAWFUL PRICE FOR THE SALE OF NATURAL GAS.

II. WHETHER THE COURT OF APPEALS ERRED IN ALLOWING THE COMMISSION TO CREATE A FEDERAL RULE OF CONTRACT CONSTRUCTION WHICH PREEMPTS THE STATE CONTRACT LAW RULES HISTORICALLY EMPLOYED TO DETERMINE THE MEANING OF GAS CONTRACTS SUBJECT TO FEDERAL PRICE REGULATION.

PARTIES BELOW

Petitioners in this case,* all of which participated in the case below, are:

Transcontinental Gas Pipe Line Corporation
ANR Pipeline Company
Natural Gas Pipeline Company of America
Sea Robin Pipeline Company
Southern Natural Gas Company
Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.
Texas Eastern Transmission Corporation
United Gas Pipe Line Company
Interstate Natural Gas Association of America

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* In compliance with Rule 28.1 of the Rules of this Court, Petitioners hereby state that:

Transcontinental Gas Pipe Line Corporation is a wholly-owned subsidiary of Transco Energy Company. Its non-wholly owned affiliates are: Border Gas, Inc. and NESP Supply Corporation.

ANR Pipeline Company is a wholly owned subsidiary of American Natural Resources Company. American Natural Resources Company is a wholly-owned subsidiary of Colorado Interstate Corporation, which is, in turn, a wholly owned subsidiary of The Coastal Corporation. Its non-wholly owned affiliates are Canyon Creek Compression Company; Overthrust Pipeline Company; Geogas Enterprise, S.A.; Jayhawk Pipeline Corporation; Great Lakes Gas Transmission Corporation; Numericom, Inc.; High Island Offshore System.

Natural Gas Pipeline Company of America is a wholly owned subsidiary of MidCon Corp. Its non-wholly owned affiliates are: U-T Offshore System; High Island Offshore System; Canyon Creek Compression Company; Stingray Pipeline Company; Overthrust Pipeline Company; Trailblazer Pipeline Company; Acadian Gas Pipeline System; Bayou Interstate Pipeline System; Calcasieu Gas Gathering System; Great Plains Coal Gasification Associates; Louisiana Industrial Gas Supply System; Pelican Interstate Gas System; Pelican Transmission System; Pontchartrain Natural Gas System; Research Technologies Associates; Spindletop Gas Distribution System; Main Pass 151 Pipeline Company; Razorback Pipeline Company; MV Pipeline Company; MidVen Pipeline Company; ElCon Gas Marketing Company.

In addition to the foregoing, the parties below were:

Amerada Hess Corporation
Aminoil Inc.
Amoco Production Co.
Arco Oil and Gas Company
Ashland Exploration, Inc.
Associated Gas Distributors
Cabot Petroleum Corporation
Chevron U.S.A., Inc.
Cities Service Oil and Gas Corporation
Colorado Interstate Gas Company
Conoco Inc.
Diamond Shamrock Corporation

Tennessee Gas Pipeline Company is a division of Tenneco, Inc. The non-wholly owned affiliates of Tenneco, Inc. are: Poclain S.A. (France); Compania Tecnico Envasadora S.A. (Spain); Compania Tecnico Envasadora S.A. (Spain); Kern River Gas Supply Corporation (Delaware); Kern River Service Corporation (Delaware); Monroe Auto Pecas S.A. (Brazil); Tenneco Automobile Foreign Sales Corporation Limited (Jamaica); Collins Pipeline Company (Delaware); Kern River Canal and Irrigating Company (California); Alcan Ekco Limited (United Kingdom); A/S Haustrup-Ekco Aluminum-Emballage (Denmark); Toyo Ekco Company, Ltd. (Toya Ekco Kubushiki, Kaisha) (Japan); Skogstre A/S (Norway); T & M Terminal Company (Delaware); Tenneco Insurance Ventures Inc. (Delaware); FC Marine Inc. (Delaware); Mistal, Inc. (Delaware); TENN-USS Chemicals Finance Corporation (Delaware); Tenneco Oil of Nigeria Unlimited (Nigeria); Tenngasco Gas Gathering Company (Delaware); HT Gathering Company (Delaware); Oasis Pipeline Company (Delaware); Tenneco Oil Company of Nigeria Unlimited (Nigeria); Sara Gretes Cafeteria AB (Sweden); Adela Investment Company S.A. (Luxembourg); Omni-Pac S.A.R.L. (France); P.P.M. Guindastes Hidraulicos S.A. (Brazil); S.A. Paper Chemicals (Proprietary), Limited (South Africa); Case Vibromax GmbH (Germany); Case Vibromax GmbH und Co.; Vibromax France SARL (France); Vibromax SCI (France); Omni-Pac GmbH (Germany); Omni-Pac S.A.R.L. (France); Case Poclain GmbH & Co. (Germany); Vibromax France SARL (France); Vibromax SCI (France); Case Poclain GmbH & Co. (Germany); Vibromax France SARL (France); Depositas Del Norte, S.A. (Spain); Case Vibromax GmbH und Co. (Germany); Albright & Wilson (Australia) Ltd. (Australia); Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom);

Ecee, Inc.
Elf Aquitaine, Inc.
Exxon Corporation
Getty Oil Company
Gulf Oil Corporation
J.M. Huber Corporation
Hunt Oil Company, et al.
Inexco Oil Company
Kerr-McGee Corporation
Marathon Oil Company
Mitchell Energy Corporation
Mobil Oil Corporation, et al.
Monsanto Oil Company
Panhandle Eastern Pipeline Company/Trunkline Gas Company
Pennzoil Company

Akulu Marchon (PTY) Ltd. (South Africa); Akulu Chemicals (PTY) Ltd. (South Africa); Marchon-Paragon Holdings (PTY) Ltd. (South Africa); Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa); Universal Chemical Contractors (PTY) (South Africa); Polyphosphates Inc. (Philippines); Albright, Morarji and Pandit Limited (India); Arndale Fuels Ltd. (United Kingdom); Bracey Petroleum Products Ltd. (United Kingdom); Butler Oil Products Ltd. (United Kingdom); Tees Storage Limited (United Kingdom); Intertractor Viehmann GmbH & Co. (Germany); and Stoco Mutual Water and Sewer Company (California).

Southern Natural Gas Company is a wholly owned subsidiary of Sonat Inc. Its non-wholly owned affiliates are: Sea Robin Pipeline Company and Bear Creek Storage Company.

Sea Robin Pipeline Company is an unincorporated joint venture of United Offshore Company, a wholly owned subsidiary of United Gas Pipe Line Company, described below, and Southern Deepwater Pipeline Company, a wholly owned subsidiary of Southern Natural Gas Company, described above.

United Gas Pipe Line Company is a wholly owned subsidiary of United Energy Resources, Inc. which is, in turn, a wholly owned subsidiary of MidCon Corp. Its subsidiaries and affiliates are: Alabama Gulf South Pipeline Company, Inc.; Alabama Methane Production Company; Cotton Petroleum Corporation; Cotton Limited Partnerships; Cotton Petroleum Canada Limited; Ione Gas Processing Company; Lake Energy Gathering, Inc.; Lake Murray Partnership; Wewoka Exploration Company; United Crude Company; Florida

Pennzoil Producing Company
Pennzoil Oil & Gas, Inc.
Pennzoil Louisiana and Texas Offshore, Inc.
Phillips Petroleum Company
Phillips Oil Company
Pinto, Inc.
Placid Oil Company
Sohio Petroleum Company
Sun Exploration and Production Company

Gulf South Pipeline Company; Gulf South Pipeline Company; Mississippi Gulf South Transmission Company; PetroUnited, Inc.; PetroUnited Products, Inc.; Live Oak Plant Partnership; PetroUnited Terminals, Inc.; Unitex Hydrocarbons, Inc.; Texas Gulf South Pipeline Company; UER Gas Trading, Inc.; Gas Clearing House Corporation; Gas Clearing House Operating Company; U.S. Natural Gas Clearing House, LTD; UER Marketing Company; UER Overseas Finance, N.V.; UER Services, Inc.; United Energy Services Company; J. W. Gibson Well Service Company; Mercury Drilling Company; United Gas Pipe Line Company; Texas Offshore Pipeline System, Inc.; High Island Offshore System (HIOS); Trans-Anadarko Pipeline Company; Trans-Anardo Pipeline System; United Alaska Fuels Corporation; Alaskan Northwest Natural Gas Transportation Company; United Mid-Continent Pipeline Company; Northern Border Pipeline Company; United Offshore Company; Sea Robin Pipeline Company; Unitex Offshore Transmission Company; U-T Offshore System (UTOS); United Alabama Onshore Corporation; Mobile Bay Pipeline Company; United Overseas Services, Inc.; Intragas Management B.V.; Petro-UER AG; Antwerp Gas Terminal V.G.N.; UER International Limited; UER Petro-Products AG; Intragas C.V.; United Overseas Limited; United Texas Transmission Company; Coastline Gas Pipeline Company; Coastal Plain Gas Company; NEWMART, Inc.; South Gulf Energy, Inc.; SURTEX Gas Company; Texas Industrial Energy Company; UTRADE Gas Company; United Texas South Plains, Inc.; Palo Duro Pipeline Company, Inc.; South Plains Energy, Inc.; Tiltex Gas Company; Western Energy Transport Company.

Texas Eastern Transmission Corporation is a wholly-owned subsidiary of Texas Eastern Corporation. Its non-wholly owned affiliate is Algonquin Energy Corporation.

Interstate Natural Gas Association of America is a trade association whose member companies are as follows: Alabama-Tennessee Natural Gas Company, Algonquin Gas Transmission Company, ANR

Tenneco Oil Company
Texaco Inc.
Texas Production Company
Transwestern Pipeline Company
The Superior Oil Company
Union Oil Company of California
Williams Exploration Company

Pipeline Company, Black Marlin Pipeline Company, Colorado Interstate Gas Company, The Columbia Gas System, Inc., Consolidated Natural Gas Company, Continental Resources Company, El Paso Natural Gas Company, Granite State Gas Transmission, Inc., Great Lakes Gas Transmission Company, KN Energy, Inc., Locust Ridge Gas Company, Michigan Gas Storage Company, MidCon Corporation, Mid Louisiana Gas Company, Mitco Pipeline Company, Northern Natural Gas Company, Northwest Energy Company, Pacific Gas Transmission Company, Pacific Interstate Transmission Company, Panhandle Eastern Corporation, Ringwood Gathering Company, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Texas Oil & Gas Corporation, Transco Energy Company, United Gas Pipe Line Company, Valero Interstate Transmission Company, Valley Gas Transmission, Inc.

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Transcontinental Gas Pipe Line Corporation, *et al.*, hereby petition the Court for a writ of certiorari to review a portion of the August 19, 1985 decision of the United States Court of Appeals for the Fifth Circuit involving a Declaratory Order issued by the Federal Energy Regulatory Commission ("Commission") on January 17, 1983. That Declaratory Order interprets the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (Supp. 1985), to permit sellers of natural gas to collect valuable consideration which exceeds the maximum lawful price ceilings established by Congress in Title I of the NGPA. Accordingly, this proceeding will establish principles of broad importance to the administration of the NGPA and affect the entire natural gas industry.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported; a copy of that decision is set out at Appendix A. The Declaratory Order of the Commission is reported at 22 FERC ¶ 61,013 (1983) and the order on rehearing of that Declaratory Order is reported at 24 FERC ¶ 61,004 (1983); these orders are set out at Appendices B and C, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1985. A Petition for Rehearing was filed with the Court of Appeals by Petitioners on October 2, 1985. The Court of Appeals denied that Petition for Rehearing on October 17, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute upon which the Court of Appeal's decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432, the relevant portions of which are set out at Appendix D.

STATEMENT OF THE CASE

A. Introduction

This case involves an interpretation of the NGPA that will pervasively influence the enforcement of the maximum lawful ceiling prices established by Congress in Title I of the NGPA. Specifically, the court of appeals upheld a determination by the Commission that the latter

will, as a general rule, ignore non-monetary consideration paid to a producer in a "first sale" transaction[1] when enforcing Section 504(a) of the NGPA, which states that "[i]t shall be unlawful for any person . . . to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this Act."[2] As a result of this determination, only part of the valuable consideration provided the seller in any first sale contract will be subject to the maximum lawful prices established by Congress, while a portion of such valuable consideration will escape the limitations imposed by Congress altogether. The question presented in this case is whether Congress intended that the statutory term "price" be interpreted so as to allow a significant amount of economic value to be transferred to producers in addition to a monetary "price" equal to the maximum allowed by law.

B. Facts

The free or unreimbursed portion of the value of transportation by pipeline purchasers of certain hydrocarbon commodities[3] owned by producers-sellers is the non-

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1. "First sale" is a defined term in the NGPA. 15 U.S.C. § 3301 (21). Congress promulgated the maximum lawful prices of Title I to be applicable to those "first sales" of natural gas not deregulated as to price under other provisions of the statute.

2. 15 U.S.C. § 3414(a).

3. The principal energy resource delivered to natural gas consumers by interstate pipelines is methane gas. Methane, however, is typically produced along with heavier hydrocarbon substances, some of which are produced in a vaporous state while others are produced in liquid form. The vaporous non-methane substances, such as propane, butane, ethane among others, can be easily processed into liquid form and are known in the industry as "liquefiables." The liquid non-methane hydrocarbons are condensate, which is easily separated from the vaporous gas stream. By contract, producers often retain title to the "liquids" and the right to extract the "liquefiables."

monetary consideration that the Commission orders specifically held could be received by sellers in addition to cash payments equal to the maximum lawful price ceiling. Pipeline purchasers typically contract to buy gas at the wellhead from producers and build facilities to connect these wells to their interstate systems. This physical connection allows pipelines to receive not only the methane gas but also the liquids and liquefiables owned by producers. Producers often demand in connection with the negotiation of a sale of gas to a particular pipeline that the pipeline undertake the transportation of these producer-owned liquids and liquefiable hydrocarbons to a central location where the separation and processing of those commodities is more economically accomplished. As an inducement for the sale of the gas, producers also demand that such pipeline transportation service be performed at no charge or at a cost that is less than its true cost.

The benefits of free or subsidized transportation of liquids and liquefiables to producers have historically been recognized as consideration received by those producers and the regulated wellhead price for gas has been adjusted downward to reflect the value of such transportation services.[4] In view of this historical treatment, a number of petitions for declaratory orders were filed with

4. This Court long ago recognized the value of free or partially unreimbursed transportation of liquids and liquefiables by a purchaser on behalf of its seller as a relevant factor to be weighed in determining the reasonableness of a producer's regulated price. Atlantic Refining Company v. Public Service Commission, 360 U.S. 378, 393 (1959). The Commission consistently followed the Court's admonition. *See, e.g.*, Continental Oil Company, 27 F.P.C. 96 (1962); Southern Louisiana Area Rate Proceeding, 46 F.P.C. 86 (1971), *aff'd.*, Placid Oil Company v. Federal Power Commission, 483 F.2d 880 (5th Cir. 1973), *aff'd. sub nom.*, Mobil Oil Company v. Federal Power Commission, 417 U.S. 283 (1974).

the Commission after Congress enacted the NGPA concerning the impact that the maximum lawful price ceilings established in Title I of the Act would have on a producer's receipt of these valuable benefits.[5] Essentially the question posed in these petitions was whether the amount paid to a producer by its purchaser in the form of subsidized transportation services would continue to be considered as part of the producer's "price" for gas, as historically had been the case when enforcing the wellhead price ceilings.

On the basis of the pleadings, the Commission issued its Declaratory Order on January 17, 1983.[6] Construing the NGPA, the Commission held that the consideration received by producers in the form of free or partially unreimbursed transportation service would *not* be considered part of the "price" which they receive for the "first sale" of their gas under the NGPA, even though that service was of unquestioned value to the producers. The Commission concluded that producers could collect a monetary price equal to the applicable statutory ceiling price and *also* collect additional valuable non-monetary consideration in the form of free or partially unreimbursed transportation for their liquids and liquefiables without violating Title I ceiling price limitations.

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5. On May 29, 1981 a group of producers calling themselves the "Indicated Producers" filed a Petition requesting the Commission to disclaim the applicability of Title I ceiling prices to the transportation of liquids and liquefiables. Subsequently, the Associated Gas Distributors, Texas Eastern Transmission Company and the Interstate Natural Gas Association of America filed Petitions requesting that the Commission find the value of liquids and liquefiables transportation that was not reimbursed fully by the producer would constitute part of the first sale price paid for gas purchased from that producer and therefore would be subject to ceiling price limitations along with other consideration received by the producer.

6. App. B, *infra*.

The Commission's premise supporting its interpretation of the statutory term "price" is that Congress was aware of a Commission cost allocation policy allegedly adopted in pipeline rate cases, even though the first case where that policy was applied was decided five years after the NGPA was enacted. That alleged policy which Congress was said to have relied upon was first adopted in connection with pipeline ratemaking under the Natural Gas Act ("NGA")[7] in 1983 and not in connection with any case involving the lawfulness of a producer's wellhead price.[8] Even the Commission does not claim that its cost allocation policy affects a producer's contract right to receive free or partially subsidized transportation service as part of its consideration for the sale of its gas. Therefore, even if Congress had been aware of the alleged cost allocation policy when it enacted the NGPA, it is not apparent why Congress would have relied on such a policy as the basis for determining what elements of a producer's "price" would be subject to Title I price ceilings. Congress could have reasonably intended that the non-monetary benefit that producers receive in the form of free or partially subsidized transportation service be subject to price ceilings *precisely because* that policy permits the receipt of valuable services by a first seller without payment.[9] Since Congress' purpose in Title I of

7. 15 U.S.C. § 717, *et seq.*

8. The Commission relied on Mobil Oil Company v. Federal Power Commission, 483 F.2d 1238 (D.C. Cir. 1974), where the court addressed the jurisdiction of the Commission to set minimum transportation rates for non-methane hydrocarbons. A jurisdictional determination by a court does *not* establish regulatory practice. As noted above, the first pipeline rate cases in which the Commission's cost allocation policy was applied were decided in 1983.

9. This construction would be consistent with the limited discretion Congress gave the Commission under Section 601 of the NGPA, 15 U.S.C. § 3431, to disallow cost recovery by pipeline purchasers.

the NGPA was to impose maximum lawful ceiling prices *on the sale price charged by producers* in first sale transactions and it was *not* concerned with downstream sales by pipelines to their customers, the question presented to the Commission—and largely ignored in its Declaratory Order—was whether there is any reasonable basis to suppose that Congress intended producers to retain these non-monetary benefits over and above the applicable maximum lawful price. The Commission's resolution of that question creates a large loophole in the ceiling price structure of the NGPA based on the assumption that Congress intended that result with respect to the value of liquids and liquefiable transportation service. Recognizing the logical consequences of its decision, however, the Commission itself equivocated on the application of this interpretation to other types of non-monetary consideration,[10] even though the Commission's rationale was squarely based on the fact that subsidized transportation was non-monetary in nature.

Numerous applications for rehearing were filed with the Commission, all of which were denied by Commission order.[11] The Commission's orders were timely appealed[12] and on August 19, 1985 the court below rendered a decision, which, *inter alia*, affirmed the Commission's

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10. *See*, App. B, at 41a n. 21 where the Commission indicated that some forms of non-monetary consideration might be considered in enforcing Title I ceiling prices.

11. App. C, *infra*.

12. Several parties petitioned for review of the Commission's Declaratory Order to the United States Court of Appeals for the District of Columbia Circuit. In response to the motion of the Respondent Commission, however, that court transferred the case to the United States Court of Appeals for the Fifth Circuit, where the case was consolidated with on-going proceedings involving other Commission orders.

interpretation of the term "price" as used in the NGPA on two independent bases.[13] The court below held that "on the special facts of this case" it should defer to the Commission's interpretation of the NGPA because the Commission had adopted its cost allocation policy in pipeline rate cases under the NGA, even though there was no such policy in place when the NGPA was enacted.[14] With specific reference to the question of whether this transportation service benefit received by producers constituted part of the "first sale price," the court below merely held that "we are unpersuaded that the Congress intended to require the Commission to consider this particular service as part of the price"[15] without attempting to explain its ruling in this regard.

REASONS FOR GRANTING WRIT

I.

The Writ Should Be Granted To Rectify The Commission's Erroneous And Unreasonable Interpretation Of The Critical Statutory Term "Price" Because That Interpretation Will Affect Virtually All Price-Regulated Sales Of Natural Gas

The court of appeals erroneously affirmed an unreasonable interpretation of the statutory term "price" by the Commission. Effective enforcement of the maximum lawful price ceilings established by Congress in the NGPA depends on a reasonable interpretation of the statutory term "price," because the "price charged for natural gas

13. App. A, *infra*, at 24a-26a.

14. App. A, at 26a.

15. *Id.*

was the very subject that Congress intended to regulate by imposing price ceilings. There are thousands upon thousands of first sale transactions taking place every day throughout the Nation. In each transaction the purchaser pays a sale price based on its contract. In thousands of these first sale transactions, Congress mandated that the first sale contract price be subject to the ceiling price limitations of Title I of the NGPA and these limitations have applied to virtually all price-regulated first sales since December 1, 1978.[16] The Commission's erroneous interpretation of "price" potentially affects all such first sale transactions subject to a price ceiling.

The disruptive impact of the Commission's unreasonable definition of the statutory term "price" will not be confined to the specific type of non-monetary consideration involved in this case. Even though the court below attempted to limit its holding to "the special facts of this case"[17] and the Commission has equivocated with respect to the scope of its interpretation, a statutory interpretation involving a term so integral to the statutory scheme as that of "price" cannot be so limited. Congress gave no indication in the NGPA that the term "price" would be subject to differing interpretations and the statutory term "price" logically cannot include certain types of non-monetary consideration and exclude other forms of non-monetary consideration, both of which are agreed to by contract. For example, the time value of interest-free loans to producers represents non-monetary consideration

16. Where the contract price is below the Congressionally-established ceiling price, the contract price *becomes* the ceiling price. *See, e.g.*, JM Resources, 32 FERC ¶ 61,418, 61,930 n. 3 (September 20, 1985), where the Commission held that "[u]nder the NGPA, the maximum lawful price is the NGPA price or the applicable contract price, whichever is lower".

17. App. A, at 26a.

of considerable value which is no different in substance than the value of the transportation services involved in this case. Neither type of valuable consideration would be considered to be part of the "price" paid for gas by the purchaser under a literal application of the Commission's ruling.[18] Consequently, the Commission's interpretation may not only affect the compensation paid in every price-regulated sale of gas made since December 1, 1978 but also may control the receipt of every form of valuable non-monetary consideration by first sellers. Unless the Commission's narrow and equivocal interpretation is reversed by this Court, Congress' statutory price ceilings will be grossly undermined, if not rendered totally illusory.

II.

The Writ Should Be Granted Because The Commission's Interpretation Of "Price" Is Demonstrably Inconsistent With Congress' Intent

In the NGPA Congress established its own scheme of price ceilings applicable to the first sale of gas. The

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18. Yet the Commission itself considered adopting rules that would have made the value of such non-monetary consideration accountable under the price ceilings set forth in Title I of the NGPA. "Proposed Rulemaking," 45 Fed. Reg. 28,345 (April 29, 1980). While the Commission did not issue the rule, in the rulemaking proposal the Commission stated that it wished "to prevent producers from circumventing the policy of the NGPA by receiving the maximum lawful price, plus another thing of value: the use of capital over time without payment of interest at a market rate." *Id.* It should be noted in this regard that the Commission's trial staff takes the position in a pending case not yet decided by the Commission that the time value of prepayments for gas—another form of non-monetary economic inducement—is subject to Title I ceiling price limitations. *See*, Transcontinental Gas Pipe Line Corporation, FERC Docket Nos. TA85-1-29-000 and TA85-3-29-000 (Purchasing Practices), Initial Brief of the Commission Staff, filed August 16, 1985.

applicable price ceilings are defined in Title I of the NGPA. This case involves an agency interpretation of the term Congress used to refer to what was being regulated, namely the "price" charged by first sellers. Title I price ceilings were meant as a limitation upon the sale price that a producer might charge for its gas. That Congress intended such limitations to apply is clear in Section 504(a) of the NGPA,[19] where Congress mandated that "[i]t shall be unlawful for any person . . . *to sell* natural gas *at a first sale price* in excess of any maximum lawful ceiling price under this Act." Unless the Commission accurately interprets the term "first sale price," it cannot properly enforce Congress' maximum lawful ceiling prices and, because a decision on this question will affect virtually every price-regulated sale of natural gas, the proper enforcement of Congress' entire ceiling price structure is involved.

The Commission's interpretation of the term "price" adopts an unduly restricted definition of that term which equates first sale "prices" with only the money that will be paid by a purchaser. The term "price" has a much broader meaning in common parlance. When interpreting the language used by Congress in a statute, it is assumed that Congress contemplated that the ordinary meaning of its words would control.[20] Where the intent of Congress is clear based upon the ordinary meaning of the words used, the courts as well as the

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19. 15 U.S.C. § 3414(a), emphasis supplied.

20. Park 'N Ride v. Dollar Park and Fly, Inc., 105 S. Ct. 658, 662 (1985) where this Court held that statutory construction must rely on the assumption that the ordinary meaning of the language used by Congress accurately expresses its legislative purpose.

administrative agency must give effect to that intent.[21] This Court is the final authority on issues of statutory construction[22] and where, as here, the agency below has misconstrued Congress' intent as expressed in the statute, this Court should properly exercise its supervisory powers in order to assure that the Congressional objective is served.

Even though the term "price" is not defined in the NGPA, Congress defined the term "sale" in broad terms as "any sale, exchange, or other transfer for value."[23] Based on that definition, it is clear that Congress clearly contemplated that the "price" received in a "sale" could include more than just money. For example, since a sale encompasses an "exchange" and in an exchange typically no money changes hands, the value of the commodity received in exchange for natural gas would represent the sale price. Similarly, a "transfer for value" can encompass more than mere monetary payment for a commodity. With respect to the statutory term "price," the structure of the NGPA itself indicates that Congress intended a broad meaning similar to that defined for the term "sale" rather than the narrow meaning ascribed to that term by the Commission. Having established price ceilings itself and commanded that such ceiling be enforced, it cannot be reasonably concluded that Congress contemplated that its price ceiling limitations would be eroded as an effective limitation upon price by a novel administrative definition

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21. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2781-2782 (1984).

22. *See, e.g.*, Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981).

23. 15 U.S.C. § 3301(20).

of the elements of "price" which were subject to those ceilings. There is no indication in the NGPA that Congress intended less than full applicability of the maximum lawful ceiling prices governing the first sale of natural gas to all of the consideration paid to the seller of the gas. On the contrary, it is clear from the language of the NGPA that any exclusions from enforcement of ceiling prices must be based on *express* provisions set forth by Congress. Nevertheless, in the order before the Court, the Commission has granted a blanket exemption for a common form of non-monetary consideration received by sellers under first sale contracts. Congress did *not* expressly authorize any such type of exemption in the statute and, therefore, the Commission's construction raises a serious question whether the statute was correctly interpreted.

This Court has held that "the meaning of a word [in a statute] must be ascertained in the context of achieving particular objectives."[24] Congress' intent as to the meaning of the term "price" is revealed by the context in which that term is used in the NGPA. In Section 101 (b)(9) of the NGPA, Congress mandated that the maximum lawful price structure would not supersede *"any price* which is established under any contract for the first sale of gas. . . ."[25] That provision of the NGPA has been construed as "Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship."[26] Section 101(b)(9) of the

24. *Chevron, supra,* at 2791.

25. 15 U.S.C. § 3311(b)(9), emphasis supplied.

26. Pennzoil Company v. Federal Energy Regulatory Commission, 645 F.2d 360, 375 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982).

NGPA continues the method of regulating natural gas prices recognized by this Court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*,[27] where it was held that "except as limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act."[28]

Since parties contracting for the sale of natural gas at the wellhead have the inherent power to agree upon a "price" which consists of both monetary and non-monetary elements of consideration, the Commission's interpretation of the statutory term "price" conflicts with the basic premise of the NGPA as reflected in Section 101 (b)(9) that the price for natural gas will be established in the first instance by private agreement. As the Commission and Congress were fully aware, it had long been the practice in the industry to contract for free or partially unreimbursed transportation of liquids and liquefiables owned by the seller as one decisive element of non-monetary consideration given in return for the purchase of the seller's gas. Congress' broad reference to *any price* established under any contract implies that Congress intended to encompass any consideration agreed upon by contract between parties to any first sale transaction. It was that privately negotiated price which Congress, in turn, intended be subject to Title I price ceilings, rather than some notion of "price" that was first to be administratively defined.

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27. 350 U.S. 332 (1956). *See also*, Sierra Pacific Power Company v. Federal Power Commission, 350 U.S. 348 (1956).

28. 350 U.S. at 343.

Section 110 of the NGPA[29] also shows that Congress intended that *all* consideration received by a seller in a first sale be subject to ceiling price limitations. In that provision, Congress set forth certain types of payments commonly received by sellers pursuant to the terms of first sale contracts, such as reimbursement for severance taxes paid by the producer and compensation for performing production-related services, and *expressly* authorized the receipt of these payments in addition to maximum lawful price ceilings. The clear inference is that Congress believed that the maximum lawful ceiling prices set forth in Title I would have limited these payments absent an *express* provision like Section 110. It follows that the exemptions from maximum lawful ceiling price limitations expressly set forth in Section 110 were intended to be exclusive and all other types of consideration which were not expressly exempted were intended by Congress to be limited by Title I ceiling prices. However, the Commission's orders purport to exempt a common form of non-monetary consideration from ceiling price limitations by a process of administrative definition in the guise of statutory construction. In effect, the Commission's orders before the Court rewrite Section 110. The deference typically afforded an agency's construction of the statute it enforces[30] does not amount to a license to rewrite the language enacted by Congress[31] and should not be countenanced by this Court.

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29. 15 U.S.C. § 3320.

30. Blum v. Bacon, 457 U.S. 132, 141 (1982).

31. Heckler v. Mathews 104 S. Ct. 1387, 1396 (1984).

III.

The Writ Should Be Granted Because There Is No Indication In The NGPA That Congress Intended To Preempt State Law As The Basis For Ascertaining A First Sale Price Under The NGPA

Because Congress intended that the "first sale price" of natural gas continue to be set in the first instance by private contract, the Commission's orders raise the important question of whether Congress intended to preempt the application of state law in determining the contract price for gas. By creating its own rule as the benchmark for identifying a first sale price, the Commission has rejected the traditional rules used to interpret contracts. Historically, the meaning of a contract subject to regulation has been determined by the application of state law principles.[32] The Commission rejected this approach, holding that it will interpret contracts by ignoring non-monetary consideration when determining the "price" which is subject to regulation under the NGPA ceiling prices. This iron-clad rule will apply irrespective of the parties' intent or the result that would be achieved under applicable state rules of construction. Since the statute itself evidences Congress' intent that its maximum lawful price ceilings to apply to the "price" established by contract, the Commission's arbitrary definition of "price" has the effect of preempting applicable state rules of contract construction.

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32. *See e.g.*, Premier Resources, Ltd. v. Northern Natural Gas Company, 616 F.2d 1171, 1180 (10th Cir.), *cert. denied*, 449 U.S. 827 (1980); Phillips v. Federal Energy Regulatory Commission, 586 F.2d 465 (5th Cir. 1978).

Under the regulatory scheme enacted in the NGPA, there is no express or implied basis for the conclusion that Congress mandated the preemption of state law as the basis for determining the contract "price" for gas. The Commission's action in promulgating a federal rule for use in identifying a contract "price" conflicts with applicable judicial construction of the NGPA on this very point. In *Pennzoil Company v. Federal Energy Regulatory Commission*,[33] the court addressed the question of whether the Commission had authority under the NGPA to create a federal rule of contract construction for purposes of enforcing of the statutory scheme. The court held that "[n]either the NGPA nor the NGA expressly preempt the application of state contract law to the interpretation of gas purchase contracts"[34] and "the NGA and NGPA are not so pervasive a scheme of federal regulation as to indicate a congressional objective that cannot be attained without application of federal common law."[35] In matters of contract construction, such as the determination of the contract "price," the court held that the Commission must apply state law rules of contract construction.

Because state contract law generally holds that the parties' intent as to "price" will control rather than any arbitrary administrative definition, the Commission's creation of a new federal rule of contract construction also implies that Congress intended to abrogate any contract where the parties intended non-monetary consideration to represent part of the price for natural gas. There is simply no basis for this conclusion in the statute. Congress was

33. 645 F.2d at 383-387.

34. *Id.*, at 384.

35. *Id.*, at 385.

aware of the vast body of contract law which lends meaning to the common term "price." For example, under the Uniform Commercial Code, the sale of natural gas is a sale of goods,[36] and the Code's definition of price is that which is payable in money or other consideration.[37] *Black's Law Dictionary*, 1070 (5th ed. 1979), defines the term price broadly as "[t]he consideration given for the purchase of a thing." Congress did not evidence an intent to use a more narrow or circumscribed meaning for this common term in the NGPA. Instead, it expressly intended to give effect to *"any price established under any contract* for the first sale of natural gas."[38] Since Congress expected that state law would be used to interpret private contracts, as the *Pennzoil* court has held, the only reasonable conclusion is that it intended to adopt the full meaning that "price" would have under state law. The Commission's determination to circumvent, and indeed supplant, applicable state law by creating its own definition of "price" should be set aside by this Court as an unwarranted and unnecessary shift in the historical reliance of Congress on state law to interpret private contracts.

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36. *Pennzoil, supra*, 645 F.2d at 387; *see also*, Tex. Rev. Civ. Stat., Bus. & C. Code § 2.107(1) (Vernon Supp. 1986).

37. *See, e.g.*, Tex. Rev. Civ. Stat., Bus. & C. Code § 2.304 (Vernon Supp. 1986).

38. 15 U.S.C. § 3311(b)(9), emphasis supplied.

CONCLUSION

The Commission's narrow interpretation of the statutory term "price" will be a crucial factor in the enforcement of Congressionally-established maximum lawful ceiling prices. A resolution of this controversy will determine whether all of the valuable consideration which a producer bargained to receive (and a purchaser agreed to pay) will be subject to Congressionally-established ceiling prices or whether only monetary consideration will be considered. This Court's decision will also determine whether the Commission's attempt to preempt state law of contract construction, as prohibited by *Pennzoil*, will be allowed to stand.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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